NO. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner*

VERSUS

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC., *Respondents*

REPLY BRIEF FOR PETITIONER TEXAS INDUSTRIES, INC.

Benjamin R. Slater, Jr.
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130
(504) 586-1900
Counsel for Petitioner
Texas Industries, Inc.

Of Counsel:

William J. Hamlin
MONROE & LEMANN

HAUSER PRINTING COMPANY, INC., 623 DISTRIBUTORS ROW, HARAHAN, LA. 70123

TABLE OF CONTENTS

	PAGE
TABLE OF CASES AND OTHER AUTHORITIES	i, ii
ARGUMENT	1
I. WHETHER RESPONDENTS MADE SALES TO THE PARTICULAR PLAINTIFF IN THIS ACTION IS IMMATERIAL TO THE ISSUE BEFORE THE COURT	1
A. Civil Liability Under the Clayton Act Requires No Connexity of Sales Between the Plaintiff and the Defendant	1
B. Contribution Will Not Unduly Complicate Antitrust Litigation Nor Present Obstacles to a Valid Defense.	5
C. Apportionment of Contribution Should Not Be Based on Sales to a Particular Plaintiff.	7
II. THE GOVERNMENT'S POSITION IN THIS CASE IS INHERENTLY INCONSISTENT WITH ITS ENFORCEMENT ROLE, THE OBJECTIVES OF THE ANTITRUST LAWS, AND PREVIOUSLY STATED POSITIONS OF THE JUSTICE DEPARTMENT.	9
CONCLUSION	14

TABLE OF CASES AND OTHER AUTHORITIES

PAGE

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 11

Chattanooga Foundry & Pipeworks v. City of Atlanta, 127 F. 23 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906) 3, 7, 8

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224 (1968) 6, 7, 11

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) .. 6, 11

Northwestern Oil Co. v. Socony-Vacuum Oil Company, 138 F.2d 967 (7th Cir. 1944), *cert. den.*, 321 U.S. 792 (1944) 4, 7, 8

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 6, 11

Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2d 190 (9th Cir. 1964), *cert. den.*, 379 U.S. 880 (1964) 4, 7, 8

OTHER AUTHORITIES:

Antitrust Equal Enforcement Act of 1979; Hearing on S.1463 Before the Sub-Committee on Antitrust, Monopoly and Business Rights on the Judiciary, 96th Cong., 1st Sess. June 8, 1979 . 13

Clayton Act 5, 7, 9

Sherman Act 2

NO. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., *Petitioner*

VERSUS

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC., *Respondents*

REPLY BRIEF FOR PETITIONER TEXAS INDUSTRIES, INC.

ARGUMENT

I. WHETHER RESPONDENTS MADE SALES TO THE PARTICULAR PLAINTIFF IN THIS ACTION IS IMMATERIAL TO THE ISSUE BEFORE THE COURT.

A. Civil Liability Under the Clayton Act Requires No Connexity of Sales Between the Plaintiff and the Defendant.

Respondents have, throughout their brief, evaded addressing the real policy considerations relevant to

the issue before the Court and, instead, have attempted to focus the Court's attention on the peculiar and purely fortuitous facts of this case. The limited discovery thus far conducted in the District Court, consisting of interrogatories and one document production, indicate that the respondents apparently made no sales directly to plaintiff Wilson P. Abraham Construction Company. Petitioner, and some of the other New Orleans based ready-mix concrete companies, apparently made all of the sales for which damages are claimed.

At the outset, the fact that a particular ready-mix concrete consumer purchases from a limited number of sources reflects nothing unusual within a ready-mix concrete market, where the ultimate consumer typically purchases much of his concrete needs from the sources located nearest the job site. This is so because one of the key pricing factors of ready-mix concrete is the distance it must be delivered. However, respondents, in attempting to focus on the peculiar facts of this case, overlook the fact that for there to be an actionable wrong under Section 1 of the Sherman Act, violation of which is alleged here, there must be an illegal conspiracy or combination. Before petitioner can be found liable for an antitrust infraction, as alleged by the plaintiff, Abraham, it must be found to have entered into an unlawful combination or conspiracy that resulted in economic damage to the plaintiff. Respondents also overlook the fact that for them to be liable for contribution, they, too, must be found to have entered into the same unlawful combination with petitioner. Thus, the fact that this particular plaintiff may have made no purchases directly from the respondents is purely fortuitous and immaterial to the issue before the Court.

As long ago as 1906, this Court affirmed a decision

by the Sixth Circuit Court of Appeal allowing the plaintiff to recover treble damages resulting from an illegal combination even though the person from whom plaintiff made its purchases was not made a defendant in the action. *Chattanooga Foundry & Pipeworks v. City of Atlanta,* 127 F. 23 (6th Cir. 1903), *affirmed,* 203 U.S. 390 (1906).

In that case, plaintiff, the City of Atlanta, purchased pipe from an Alabama corporation at a price fixed by reason of illegal arrangements between members of a trust, to which the defendants belonged. The Alabama corporation was not sued. The principal question decided by this Court dealt with a statute of limitations issue, but the Court of Appeal specifically addressed the significance of the absent seller:

> That there was evidence tending to show that the plaintiff had been compelled to pay an unreasonable price for the pipe which it bought during the continuance of the unlawful combination complained of is not to be disputed. That its purchases were made exclusively from the Anniston Pipe Company, a corporation doing business in Alabama, and that it is not suing that corporation, is of no vital significance.

127 F. at 25.

> We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. *Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe.* If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal

combination.

127 F. at 26 (emphasis added).

Later, in *Northwestern Oil Co. v. Socony-Vacuum Oil Company,* 138 F.2d 967 (7th Cir. 1944), *cert. den.,* 321 U.S. 792 (1944), it was observed that:

> The one complaining need not sue the person to whom he has paid the illegal prices. *He may recover from any member of the conspiracy,* if he shows that the direct effect is to injure him in his business or property and produces facts from which such injury may be ascertained.

138 F.2d at 971 (emphasis added).

And, in *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190 (9th Cir. 1964), *cert. den.,* 379 U.S. 880 (1964), where it was found that a particular defendant was a participant in an unlawful combination, that defendant was forced to share the responsibility for all resulting damages, *including those occasioned by activity in which it did not directly participate or directly benefit.* 328 F.2d at 212.

Respondents also decline to point out to the Court that the instant case is not the only civil litigation to arise out of the matters alleged in the indictment. While the criminal action instituted against petitioner and respondents was pending, seven other plaintiffs filed suit in Civil Action No. 73-419 in the Eastern District of Louisiana naming petitioner and respondents as defendants and alleging illegal acts and violations virtually identical to those alleged below by Wilson P. Abraham Construction Corp. That civil action was concluded as to all defendants by compromise. The fortuitous fact, if it turns out to be so, that Wilson P. Abraham Construction Corp. made no purchases from

the respondents is thus of absolutely no consequence to the issue before this Court.

B. Contribution Will Not Unduly Complicate Antitrust Litigation Nor Present Obstacles To A Valid Defense.

Continuing with their rationale that the peculiar facts of this case argue against recognition of a right of contribution under the antitrust laws, respondents say that such a right will significantly complicate litigation and create a dilemma for the innocent defendant.

Respondents suggest that if Texas Industries is permitted to bring into the litigation "three companies that never did business with Abraham" (respondents brief p. 14), the proceedings will become significantly more complicated. They go on to suggest that should these three companies in turn choose to implead all of the other concrete suppliers in New Orleans, "some of which did business with Abraham, and some of which did not" (respondents brief p. 14), the suit would bear no resemblance to the claim Abraham set out to make.

Aside from the fact that connexity of sales between defendants and plaintiffs is immaterial for purposes of liability under the Clayton Act, as discussed above in Section A, the position asserted by respondents clearly implies that parties will, if a right of contribution is recognized, implead unlimited numbers of other parties, even where there exist no facts on which to assert such claims. Addressing respondents' argument here on their own terms, and looking at the peculiar facts of this case, there appears to be little likelihood, in view of the previous grand jury investigation, government criminal prosecution and civil action, that respondents would implead every ready-mix concrete supplier in

New Orleans. Any threat of innocent parties being brought into complex litigation would more likely come in the initial suit itself, where a plaintiff typically has little information aside from what can be gleaned from the indictment itself.

Moreover, in suggesting that contribution would place the innocent defendant in a quandry by forcing him to argue that he engaged in no unlawful combination on the one hand but that, if he did, it was with other specific parties is to suggest that the judicial system in the United States is ineffective in protecting the rights of innocent parties. If the truly innocent party could prevail if sued directly by a plaintiff, it could just as well prevail if sued for contribution. In short, there would simply be no reason for the innocent defendant to make an alternative plea for contribution unless and until it was cast in judgment.

The logic behind respondents' argument in this regard is far less compelling than the reverse of it: if parties impleaded for contribution did in fact enter into the same unlawful combination as did those seeking contribution, such parties *should* be before the Courts in order to ensure that none keep their illegal gains and escape liability. This Court has repeatedly expressed that as one of the clear objectives of the antitrust laws. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 726 (1977). *Pfizer, Inc. v. Government of India,* 434 U.S. 308, 314 (1978).

Respondents attempt to portray Texas Industries' motive in seeking contribution as one that will enable it to keep illegal profits. (Respondents' brief pps. 9-10, 23, 37). It goes without saying that Texas Industries is seeking contribution in order to spread liability among those who allegedly conspired with it in order to reduce

potential exposure should it be found liable to Abraham. However, respondents' assertion in this regard overlooks the fact that *only* where a right of contribution exists is there an assurance that those who illegally combine will be deprived of the fruits of their unlawful acts.[1]

As *Chattanooga Foundry & Pipeworks v. City of Atlanta, supra, Twentieth Century Fox Film Corp. v. Goldwyn, supra,* and *Northwestern Oil Co. v. Socony-Vacuum Oil Co., supra,* make clear, it is immaterial whether a particular plaintiff makes purchases from all who jointly created the liability in the first place. Were the peculiar facts of this case reversed, with Wilson P. Abraham Construction Corp. seeking recovery solely from the respondents, they in turn would be seeking contribution from petitioner.[2]

C. Apportionment of Contribution Should Not Be Based On Sales to a Particular Plaintiff.

Without proposing that apportionment under a contribution rule be based upon sales, respondents

---

1/ In the typical case, as was true in Civil Action No. 73-419 in the Eastern District of Louisiana, the plaintiff will sue all who allegedly combine, but where less than all are sued, contribution ensures that all parties are brought before the Court for a determination and apportionment of liability.

2/ It should be observed that, in light of the treble damages provisions of the Clayton Act, respondents' mathematical formula, displayed at pages 9 and 10 of their brief, works only where there are four or more who unlawfully combine. The fortuitousness of this mathematical formula is further evidence of the immateriality of a connexity of sales between plaintiffs and defendants.

again focus on the peculiar facts of this case and suggest that *petitioner* does not urge application of such a formula since respondents made no sales to Abraham. At the outset, it should be noted that petitioner has not suggested application of any specific formula; it has merely observed various considerations under a *per capita* or comparative formula while noting that since contribution itself is an equitable doctrine, the courts may be able to fashion such appropriate rules of contribution as are necessary to achieve fairness between the parties and preserve manageability of litigation.

Apportionment based on sales to a particular plaintiff would be inherently inconsistent with *Chattanooga Foundry & Pipeworks v. City of Atlanta, supra, Twentieth Century Fox v. Goldwyn, supra,* and *Northwestern Oil Co. v. Socony-Vacuum Oil Co., supra,* which make it clear that sales between a plaintiff and a defendant are immaterial to liability under the antitrust laws. If, as respondents suggest throughout their brief, the fact that plaintiff Abraham made no purchases from them is *material* to the question of contribution, then facts such as those peculiar to this case would result in an actual defense to antitrust liability. Clearly, had Abraham chosen to sue the respondents they could not escape liability by showing the absence of sales by them.

Moreover, for sales to be the appropriate formula, additional considerations would have to be given to whether the appropriate basis would be sales to a particular plaintiff (e.g., sales to Wilson P. Abraham Construction Corp. under the facts of this case) or percentage of sales in the affected market (e.g., the New Orleans ready-mix concrete market). The latter would, of course, be less fortuitous in application, since it would not be governed by the circumstances of a par-

ticular plaintiff, but it would be far more complex and time-consuming to define and determine.

Finally, application of a sales-related formula would be possible only in horizontal price-fixing cases. This would mean creation of different formulas or standards in apportioning liability for antitrust violations arising out of, for example, cases alleging monopoly, group-boycotts, vertical price-fixing or other restraints and the like.

II. THE GOVERNMENT'S POSITION IN THIS CASE IS INHERENTLY INCONSISTENT WITH ITS ENFORCEMENT ROLE, THE OBJECTIVES OF THE ANTITRUST LAWS, AND PREVIOUSLY STATED POSITIONS OF THE JUSTICE DEPARTMENT.

In its *amicus* brief, on page 1, the United States declares that it has the primary responsibility for enforcing the antitrust laws and defines its interest in the matter before the Court as that of insuring the continuing efficacy and deterrent effect of private sections of the Clayton Act. It says, at page 21-22, that: "... fairness to the public demands that those who behave in intentional violation of the law feel the *full consequences* of their misdeeds." (emphasis added).

In 1973 the United States Justice Department conducted a grand jury investigation in the Eastern District of Louisiana that eventually led to the indictment of petitioner, respondents and certain of their employees. All were eventually convicted on *nolo contendere* pleas. Thus, consistent with the statement made in its *amicus* brief concerning the notion of fairness demanded by the public, the United States

Government pursued both petitioner and respondents criminally, and all felt the full consequences of their alleged misdeeds, including fines to the corporate defendants and prison sentences to the employees.

Now, in the matter before the Court, the United States Government takes the position that even though the respondents were investigated, criminally prosecuted and sentenced upon conviction, they should not now be compelled to pay, by way of contribution, any damages assessed against petitioner on the basis of a finding of liability that can be possible only upon a showing of their joint culpability. This position is inherently inconsistent with the stated role of the government as primary enforcer of the antitrust laws and its declaration that fairness to the public demands that those who violate the law bear the full consequences of their misdeeds.

The government supports its position in large part by arguing that a no-contribution rule would provide greater deterrence under the antitrust laws than would a rule allowing contribution, though at the outset it concedes that:

> At present, there is little empirical evidence bearing on the question whether contribution would weaken or strengthen deterrence, or leave it unaffected. Clashing assertions have been made by federal judges, members of Congress, participants in congressional hearings, and commentators. To the extent that any consensus can be drawn from these disparate views, it is that neither economic theory nor other available tools of analysis provide an unambiguous answer.

(United States *amicus* brief, p. 11-12).

It premises its argument that deterrence is better

served by a rule against contribution by saying that the decisions of this Court establish that Congress had a two-fold purpose in prescribing a private treble damage remedy under the antitrust laws. The two-fold purpose is defined by the government as (1) to compensate the victim of antitrust violations and (2) to deter potential offenders, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Pfizer, Inc. v. Government of India, supra.* (*Amicus* brief p. 10). The government concludes that "...petitioner has wholly failed to demonstrate that an implied contribution remedy is 'necessary to effectuate Congress' goals' under the antitrust laws." (*Amicus* brief p. 10).

In presenting this argument to the Court, the government has totally ignored the existence of another objective of the antitrust laws, recognized by this Court in both *Brunswick* and *Pfizer* as well as *Illinois Brick Co. v. Illinois, supra,* and *Hanover Shoe Inc. v. United Shoe Machinery Corp., supra;* the objective of penalizing the wrong-doer by depriving him of the fruits of his illegal acts. In *Pfizer,* this Court said:

> The Court has noted that §4 has two purposes: to deter violators and *deprive them of 'the fruits of their illegality'* and 'to compensate victims of antitrust violations for their injuries.'

434 U.S. 314 (emphasis added).

In *Brunswick,* the Court recognized that:

> Of course, treble damages also play an important role in *penalizing wrongdoers* and deterring wrongdoing, as we also have frequently observed.

429 U.S. at 485 (emphasis added).

The significance of this objective of the antitrust laws was expressed by the Court in *Hanover Shoe,*

where it said:

> In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, *those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality* because no one was available who would bring suit against them. *Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.*

392 U.S. at 494 (emphasis added).

To a large extent, deterrence is achieved by virtue of the criminal and treble damage sanctions of the law, but *only* where a right to contribution is recognized can there be an assurance that violators will be deprived of the fruits of their illegal acts. Contrary to the government's assertions, petitioner has demonstrated that contribution is a necessary adjunct to achieve congressional goals under the antitrust laws.

The position of the United States Government here in opposing a right to contribution is also internally inconsistent. At page 22 of its *amicus* brief, the government concludes that:

> Moreover, quite apart from the public injury resulting from price fixing and the need to maximize deterrence in such cases, *it is fair to require any participant in the conspiracy to make good the damages caused by the conspiracy since participation by*

each member often is essential to produce the injury. (Emphasis added).

Though it did refer to certain specific testimony given by Assistant Attorney General John Shenefield in hearings before the Senate Judiciary Committee on Bill No. 1468, the Antitrust Equal Enforcement Amendment of 1979, the government fails to mention that at the outset of his testimony, Mr. Shenefield noted that: ". . .Judge Bell has asked that I tell you and the subcommittee that he is generally in favor of contribution among joint tortfeasors based on a fair share allocation of damages, with a right of recover over." (Antitrust Equal Enforcement Act of 1979; Hearings on S.1468 Before the Sub-Committee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. June 8, 1979, p. 4).

Additional testimony given by Mr. Shenefield, not referred to by the government in its *amicus* brief, is as follows:

> Contribution grew up in our law in order to somehow spread the risk of liability among all defendants and not allow one defendant to pay more than his fair, proportionate share.
>
> * * *
>
> All of us, I assume, are concerned about the question of fairness in all of the several aspects that arise in this general area. We are also concerned with fairness among defendants, and we are concerned with fairness between defendants on the one hand and plaintiffs on the other. I suppose, in a sense, we are also concerned with fairness to the public and to the criminal justice system.

> Arguments based on fairness demand important consideration, and that is why this proposal, based as it is upon fairness considerations, demands serious consideration.
>
> * * *
>
> It is quite clear, I think, *that it is unfair for any one of several parties who are jointly responsible for antitrust damages to pay more than their fair share,* defined in some way, of those damages. *Contribution,* in this context, would help to prevent that kind of a result.

(Hearings on S.1468, *supra,* at p. 5) (emphasis added).

The inconsistency of the government's position before the Senate Judiciary Committee and that taken here is inexplicable. The statements of Mr. Shenefield before the Senate Committee are, however, plainly more consistent with basic principles of fundamental fairness.

CONCLUSION

Petitioner, Texas Industries, Inc., respectfully requests the Court to reverse the judgment of the Court of Appeal for the Fifth Circuit and to remand the case to the district court for further proceedings with instructions to recognize petitioner's right to contribution under the antitrust laws.

February 20, 1981.

Respectfully submitted,

Benjamin R. Slater, Jr.
Monroe & Lemann
1424 Whitney Building
New Orleans, Louisiana 70130
(504) 586-1900

Attorneys for Petitioner
Texas Industries, Inc.

Of Counsel:

William J. Hamlin